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+WRIT PETITION Nos.8752 and 19044of 2006

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WRIT PETITION No.8752 of 2006

M.Venkata Subbaiah ..... PETITIONER

Vs.

$ Engineer-in-Chief,
Public Health, A.C.Guards
Hyderabad and 3 others
.....RESPONDENTS

and

WRIT PETITION No.19044 of 2006:

M.Venkata Subbaiah ..... PETITIONER

Vs.

$ Engineer-in-Chief,
Public Health, A.C.Guards
Hyderabad and 2 others
.....RESPONDENTS

< G I S T :

> H E A D N O T E :

! C o u n s e l Sri M.P.K.Chowdary e t i t i o n e

^ C o u n s e l f o r R . 1 : - G . P
C o u n s e l f o r R . 2 : - G . P
C o u n s e l f o r R . 3 : - S r i
C o u n s e l f o r R . 4 : - S r i

? C A S E S R E F E R R E D : -

[1] (1994) 4 S.C.C., 104

2. AIR 2000 S.C, 2272

3 AIR 1997 S.C., 1390

4 AIR 1996 S.C., 11

5 AIR 1999 S.C., 393

6 W.P.No.798/2005 of A.P.High Court, dt.10-2-2005

7 W.P.No.10388/2004 of A.P.High Court, dt.17-1-2005

8 W.P.No.16051/2004 of A.P.High Court, dt.16-11-2004

9 W.A.No.278/2004 of A.P.High Court, dt.11-2-2004

10 W.P.Nos.3663 and 3637 of 2001 of Bombay High Court, dt.28-9-2001

11 1999 (4) Bom.C.R., 729

HON'BLE SRI JUSTICE P.S. NARAYANA

Writ Petition Nos.8752 and 19044 of 2006

Date: 5th January, 2007

Between :-

WP.No.8752/2006

M.Venkata Subbaiab .. Petitioner

And

Engineer-in-Chief,
Public Health, A.C.Guards
Hyderabad and 3 others .. Respondents

WP.No.19044/2006

M.Venkata Subbaiab .. Petitioner

And

Engineer-in-Chief,
Public Health, A.C.Guards
Hyderabad and 2 others .. Respondents

HON'BLE SRI JUSTICE P.S. NARAYANA

Writ Petition Nos.8752 and 19044 of 2006

COMMON ORDER:-

1. These Writ Petitions are being disposed of by this common Order in view of the commonality of the facts and also the close nexus between the subject matter of controversy between the parties.

2. In W.P.No.8752/2006 *rule nisi* was issued on 8-6-2006 and in W.P.M.P.No.11143/2006 interim suspension as prayed for was granted.

3. The Writ Petition is filed for a Writ of Mandamus declaring the action of the respondent No.3 in cancelling the experience certificate issued on 20-6-2005 to the petitioner without a notice to the petitioner at the instance of respondent No.4 as illegal, arbitrary, unfair, unreasonable and also opposed to the principles of natural justice and consequentially the petitioner prays that this Court direct the respondents to permit the

petitioner to have the benefit of the experience certificate obtained by him in the light of clause 15 of the Annexure annexed to the Rules issued in G.O.Ms.No.94, Irrigation & C.A.D., dated 1-7-2003 and pass such other suitable orders.

4. The self-same writ petitioner filed W.P.No.19044/2006 and *rule nisi* was issued on 13-9-2006 and interim direction was granted for a limited period in W.P.M.P.No.23953/2006 which was further extended for a limited period and further extended until further orders on 27-9-2006. W.V.M.P.No.1836/2006 is filed to vacate the interim order made in W.P.M.P.No.23953/2006 in W.P.No.19044/2006.

5. The relief prayed for in W.P.No.19044/2006 is for issuance of a Writ of Mandamus declaring the action of respondents 1 and 2 in refusing to open the price bid of the petitioner in respect of the works vis., (1) Formation of right side flood bank of Mamidi Kalva from Chain 0.00 meters to 1200 meters near Gollapalem (v) in Ozili Mandal of Nellore District for an estimated contract value of Rs.77,97,580/-; (2) Mamidi Kalva Flood Bank from 0.00 metres to 1600 meters near Papireddy Kandrika in Ozili Mandal of Nellore District for an estimated contract value of Rs.1,28,37,226/-; and (3) Mamidi Kalva Flood Bank near Graddagunta from 0.00 meters to 1200 meters for an

estimated value of Rs.62,57,187/- on rejection of the technical bid of the petitioner on the ground of invalidity of the experience certificate produced by the petitioner without a notice and in accepting the only remained tender of the respondent No.3 as illegal, void, arbitrary and discriminatory and opposed to the principles of natural justice and consequentially to direct the official respondents to consider the experience certificate produced by the petitioner which is still valid in the light of the orders of the this Court in W.P.M.P. No.11143/2000 in W.P.No.8752/2006, dt.8-6-2006, and to consider the price bid of the petitioner for awarding of the work on the basis of its own merits and to pass such other suitable orders.

6. Heard Sri M.R.K.Chowdary, the learned senior Counsel representing the writ petitioner in both the Writ Petitions and G.P. for Municipal Administration, G.P. for Irrigation & CAD, Sri K.Ratangapani Reddy and also Sri E.Dhanumjaya.

7. Sri M.R.K.Chowdary, the learned senior Counsel representing the writ petitioner in both the Writ Petitions had taken this Court through the contents of the respective pleadings of the parties and had pointed out to the relevant portions of the material papers and would maintain that the Superintending Engineer would be a

party to the agreement though ultimately the Tender Committee may decide. The learned senior Counsel also had explained the relationship between the prime contractor and the sub-contractor and would maintain that how the Superintending Engineer is connected with the execution of the works. The learned senior Counsel also would contend that the status of the sub-contractor is not in serious dispute and the proceeding of the Superintending Engineer would clearly reflect the same and inasmuch as experience certificate had been granted, there cannot be any order of cancellation without notice to the petitioner and without affording the opportunity. The learned senior Counsel also had drawn the attention of this Court through clause (15) of G.O.Ms.No.94. The learned senior Counsel also would explain that on the ground that the Superintending Engineer is not competent and the Tender Committee alone is competent, the validity of the certificate cannot be doubted and at any rate, the very cancellation is in violation of the principles of natural justice. While elaborating his submissions further in relation to W.P.No.19044/2006, the learned senior Counsel would point out that the technical stand taken in the counter affidavit on the competency or in-competency of the Superintending Engineer need not be seriously considered in the light of the facts and circumstances.

The learned senior Counsel also pointed out that in the light of the facts and circumstances the stand taken that these Writ Petitions are not maintainable also cannot be sustained and whenever an action of this nature is arbitrary and hit by Article 14 of the Constitution of India, the same can be challenged under Article 226 of the Constitution of India.

8. The learned Government Pleader for Municipal Administration would point out to the relevant material papers and the relevant records produced before this Court and would maintain that the disputed questions of fact are involved and hence the Writ Petition itself is not maintainable. The learned Government Pleader also would point out that when the principal contractor disputes the sub-contract, there is no question of further probing into the matter. The learned Government Pleader also would point out that the prime contractor appointed the petitioner as sub-contractor and the same was communicated through the concerned, had not been established since no material is forthcoming in this regard. By mere execution of work, the petitioner would not be entitled to get the experience certificate and all the conditions are to be satisfied. Even otherwise the Superintending Engineer is not the competent authority

but the Tender Committee alone is the competent authority. In the peculiar facts and circumstances, the question of issuing notice does not arise. Even otherwise, the scope of judicial review being very limited in this arena, these are not fit matters to be interfered with.

9. The learned Government Pleader for Irrigation & C.A.D. in substance adopting the arguments of the learned G.P. for Municipal Administration would further maintain that in the light of the facts and circumstances and also the stand taken in the counter affidavit, these are not the matters to be interfered with. The learned G.P. made elaborate submissions on the scope of judicial review in the realm of contracts and placed reliance on several decisions.

10. Sri Ratangapani Reddy, the learned Counsel representing R.3 in W.P.No.19044/2006 had taken this Court through the contents of the counter affidavit and while adopting the arguments of the learned Government Pleaders referred to supra, further would maintain that a person who had been disqualified in technical bid has no right at all and such party is not entitled to maintain these Writ Petitions. The learned Counsel also made certain submissions relating to clause 15 and interpretation thereof.

11. Sri Dhanumjaya, the learned Counsel representing

M/s.Larson & Tubro Ltd., would report to this Court that M/s.Larson & Tubro Ltd., is not responding at all and hence the learned Counsel has no say in this matter.

12. In W.P.No.8752/2006 it is stated that tenders were invited by using Tender Notice No.1144/ONG/WSS/SST/G2/2003, dated 11-3-2003 by the respondent No.2. It is also stated that on opening of the tenders on 31-3-2003 and in the light of the minutes of the Tender Committee meeting dated 7-4-2003 the respondent No.1 informed that the tender of the petitioner for construction of 3850 M1 capacity Summer Storage Tank of Water, depth of 10.85 meters at Ongole with all ancillary works was accepted for Rs.9,59,03,787-20 ps., at 4.2% less than the estimated value put to tender and thus as per the letter of acceptance the work is to be executed in 9 months and the contract is directed to be governed by the conditions of the contract as indicated in the tender documents. It is also stated that the Government in Irrigation & C.A.D.(PWCOD) Department issued orders providing for tender procedure and registration of Contractors Rules and these Rules, though issued in Irrigation & C.A.D. Department, yet these Rules are applied to all the Engineering Departments of the Government including the Public Health Department. It is

further stated that in order to simplify adoption of the Government Orders issued in various G.Os., referred to in the Rules, the Government in supersession of such Rules, issued comprehensive order containing Rules and those Rules provided for tender procedure and registration of contractors and they are indicated in the Annexures annexed to the said G.O., and a copy of G.O.Ms.No.94, Irrigation & C.A.D., dated 1-7-2003 along with its enclosures is filed in the material papers for ready reference as Annexure-B. It is also further stated that by these Rules, clause 15 provides for the procedure for engaging of sub-contractors and to provide them the experience certificate and in other words clause 15 seeks to provide for subletting by the prime contractors to the sub-contractors subject to certain conditions to the extent of subletting. It is further stated that it shall be added to the experience of the sub-contractor and to that extent the quantity of work executed would be deducted from that of the main contractor. It is also stated that once a prime contractor resorted to permitting subletting and a sub-contractor was permitted to execute the work, the Department is under obligation to issue experience certificate adding to the experience of the sub-contractor while deducting to the same extent from the experience of the main contractor and thus under the Rules subletting is

permissible and the Department can permit subletting resulting in measuring the works executed by the sub-contractor as a matter of execution by the main contractor and the main contractor to that extent, as per records, is under obligation to pay the amount due and payable to the sub-contractor as per the terms and conditions of the agreement. It is further stated that in the instant case, the petitioner had the benefit of subletting and executed the work in terms of the contract entered into between the respondents No.2 and 3 and respondent No.4 main contractor. It is also further stated that in pursuant to this contract, the respondent No.4, being the main contractor, permitted the petitioner to execute the work and the authorities also permitted the work executed by the petitioner to be measured for the purpose of payment to the respondent No.4 main contractor and ultimately the respondent No.4 on receipt of monies from the respondents No.2 and 3 paid the amount due and payable to the sub-contractor viz., the petitioner. It is also stated that there has been no dispute about the execution or about the payments due and payable to the petitioner. It is also stated that having executed the work by way of subletting, the petitioner having been entitled to claim for issuance of experience certificate, applied for experience

certificate. It is also stated that the respondent authorities also issued the experience certificate in the light of the work order issued by the respondent No.4 to the petitioner. It is further stated that it is by virtue of the letter dated 5-5-2003 the respondent No.4 entrusted the work for execution to the petitioner by way of subletting for a value of Rs.8,70,83,536-00 and this work is to be completed during the period commencing from 2-5-2003 to 23-1-2004 and this is by an order No.4001, dated 2-5-2003 issued on 5-5-2003. It is also stated that this work later was also revised to a tune of Rs.9,40,41,395-00 and there is no dispute about the amounts paid. Further it is stated that basing upon the work orders, the petitioner executed the work and the bills as claimed by the petitioner are paid from time to time by respondent No.4 and in fact, reflecting these facts, the Senior Manager of respondent No.4 by name Mr.Vijay Kumar, L&T Ltd., Mehdipatnam, Hyderabad furnished the information to Hindustan Constructions, Mumbai on their request and it is the one contemporaneous piece of evidence emanated from L&T at the request of Hindustan Construction Corporation, Mumbai. It is also stated that this information as furnished by the Hindustan Constructions Corporation clearly manifests that this petitioner has worked as a sub-contractor for execution of the work and there is no

adverse remark against the petitioner. It is further stated that such information was solicited by Hindustan Constructions Corporation in the light of certain work to be entrusted with the petitioner and in fact those facts are nothing to do with the disputes under consideration. It is also averred that while so, after completion of the execution of the work entrusted with the petitioner, the petitioner requested for issuance of experience certificate in the light of the provisions contained in clause 15 of the Annexure annexed to G.O.Ms.No. 94 and after considerable correspondence and in the light of clause 15 of G.O.Ms.No. 94 and under the directions of respondent No.2 to respondent No.3, respondent No.3 issued the experience certificate and such certificates subsequently at the instance of respondent No.4 had been cancelled without any notice to the petitioner. Further it is stated that in the light of the experience in execution of work, the petitioner having become qualified and eligible to seek works by way of tender, has offered his tender in respect of one work i.e., Construction of Bheemavaram Summer Storage Tank, Public Health Department. It is also stated that instead of relying upon the certificate held by the petitioner and instead of awarding the work to the petitioner, respondent No.4 raised a querry as to the right

of the respondents to issue the experience certificate and on that ground the petitioner was required to extend the EMD (Bank Guarantee) from time to time for finalization of the tenders which are kept pending. It is further stated that the petitioner has nothing to raise any issue out of the tenders which are not finalized in respect of the said work viz., Bheemavaram Summer Storage Tank. It is also further stated that respondent No.4 having felt that the petitioner had been filing the tenders directly instead of getting the works by way of subletting from the respondent No.4, disputed the correctness of the experience certificate by writing a letter to the 1st respondent and the 1st respondent forwarded the said letter to the 2nd respondent. It is also stated that ultimately in the light of the internal correspondence received from the superior authorities to the subordinate authorities, the respondent No.3 cancelled the experience certificate issued to the petitioner. Further specific stand is taken that the Writ Petition is maintainable since the petitioner is questioning only the arbitrary and illegal action of R.3 in cancelling the experience certificate issued to the petitioner earlier. In Grounds 1 to 5, certain additional facts had been averred.

13. Clause 15 of G.O.Ms.No.94 – Annexure I, dealing with ***SUB-CONTRACTS*** reads as hereunder:-

"If the prime contractor desires to sub-let a part of the work he should submit the same at the time of filing tenders itself or during execution, giving the name of the proposed Sub-Contractor, along with details of his qualification and experience. The Tender Accepting Authority should verify the experience of the Sub-Contractor and if the Sub-Contractor satisfies the qualification criteria in proportion to the value of work proposed to be sub-let, he may permit the same. The total value of works to be awarded on sub-letting shall not exceed 50% of contract value. The extent of subletting shall be added to the experience of the sub-contractor and to that extent deducted from that of the main contractor."

14. Several of the work orders and the details relating to the writ petitioner and certain bills and further correspondence in this regard also had been placed before this Court.

15. In the counter affidavit filed by respondents No.1 to 3, respondent No.3 had sworn to the affidavit and had denied all the material allegations except those which had been specifically admitted. It is averred in para 3 of the counter affidavit the principal contractor of aforesaid work is M/s.Larsen &Toubro Ltd., ECC Division, Hyderabad i.e., respondent No.4 and in their letter No. L&T, ECCD, HYRO:WET:4001, dated 29-3-2006 addressed to the Engineer-in-Chief, Public Health, Hyderabad i.e.,

respondent No.1 and informed that they have not given any official subletting to M/s.M.Venkata Subbaiah, or any other contractor in writing to the Department and also requested to issue the experience certificate on Larsen & Toubro, ECC Division's name mentioning all the executed quantities and values by cancelling the experience certificate issued by respondent No.3 to the petitioner. It is also stated that based on that, the respondent No.2 had issued instructed to respondent No.3 to cancel the experience certificate dated 28-6-2005. It is further stated that in view of the directions of the respondent No.2 and as per para 15 of G.O.Ms.No. 94, I & C.A.D. (PW.COD) Department dated 1-7-2003, the 50% of the experience certificate in respect of the above work issued by the respondent No.3 has been cancelled and orders were communicated to the petitioner and the 2nd respondent had also stated vide letter dt.17-12-2005 that only Tender Accepting Authority is competent authority for approving the sub-contractor. It is also stated that the tenders were invited for the above work by R.2 and lowest tender was accepted by the respondent No.1 in favour of M/s.Larsen & Toubro Ltd., ECC Division, Hyderabad – respondent No.4 as per the minutes of the Tender Committee meeting held on 7-4-2003 but not in favour of the petitioner as

stated in the affidavit vide letter No.5998/T4/ONG (W)/Vol.XIII/2003, dated 24-4-2003 of respondent No.1 for Rs.9,59,03,787.20 i.e., 4.20% less and agreement was concluded by 2nd respondent with respondent No.4 vide Agreement No.20/2003-2004 dated 12-6-2003. Further specific stand is taken that in streamlining of tender system, the Government had issued G.O.Ms.No. 94, I & C.A.D. (PW.COD) Department dated 1-7-2003 and it is a fact to the provisions of the G.O. had been implemented by the Public Health Engineering Department also. It is also further stated that in this case, the principal contractor was M/s.Larsen & Toubro Ltd., ECC Division, Hyderabad. It is also stated that the petitioner had executed the work on behalf of the principal contractor only as poer the work order issued by respondent No.4 and while executing the work, the petitioner had represented the Superintending Engineer, Public Health, Nellore submitting consent letter i.e., work order given by the prime contractor entrusting the above work to a tune of Rs.8,70,83,536/- vide letter No.NIL dated 5-5-2003 and requested the Superintending Engineer, Public Health, Nellore – respondent No.2 to issue the experience certificate as per the provisions of clause 15 of G.O.Ms.No. 94, which had been already referred to supra. It is further stated that based on the

request made by the petitioner, the respondent No.2 had accepted the consent letter of the No.4 given to the petitioner and issued proceedings under intimation to the respondent No.4, permitting the petitioner as per G.O.Ms.No. 94 to get 50% value of the works and its quantities of the above work from the prime contractor – respondent No.4. Further it is stated that it was also advised by the respondent No.2 to the sub-let contractor to contact R.3 to obtain the experience certificate accordingly after completion of the above work, and the prime contractor M/s.Larsen & Toubro Ltd., Hyderabad is held responsible for completion of the above work as per the terms and conditions of the agreement. Even though the respondent No.4 was informed of the above facts, no objections were raised by them at that time and in view of the same, R.2 had issued instructions to R.3 to issue experience certificate to the petitioner on behalf of R.4 with quantities executed as per the provisions laid down in para 15 of the Annexure G.O.Ms.No. 94, I & C.A.D. (PW.COD) Department dated 1-7-2003, vide respondent No.3 Memo No.1144/Ongole/WSIS/2nd SS tank/DB/D2/2003, dated 7-11-2003 and in obedience of the instructions issued by the respondent No.2, the respondent No.3 had issued 50% of the experience

certificate duly noting the executed quantities and its values on 28-6-2005 and the same was counter signed by R.2. It is further stated that the principal contractor of the aforesaid work – R.4 in their letter No. L&T, ECCD HYDO:WET:4001, dated 29-3-2006 addressed to the Engineer-in-Chief, Public Health, Hyderabad – respondent No.1 informed that they had not given any official subletting to M/s.M.enkata Subbaiah or any other contractor in writing to the Department and also requested to issue the experience certificate on M/s.Larsen & Toubro Ltd., ECC Division's name mentioning all the executed quantities and values by cancelling the experience certificate issued by respondent No.3 to the petitioner. Based on that, R.2 had issued instructions to R.3 to cancel the experience certificate dated 28-6-2005 and in view of the directions of the respondent No.2 and as per para 15 of G.O.Ms.No. 94, referred to supra, the 50% of the experience certificate in respect of the above work issued by R.3 had been cancelled and orders were communicated to the petitioner and R.4 in letter No.Ong/2n SS tank/DB/D1/2006/263 M, dated 6-4-2006. Thus the specific stand taken that the experience certificate issued by R.3 was cancelled in view of the objections raised by R.4 in letter dt.29-3-2006 to R.1 with a copy the R.2 and R.3 and on instructions of R.2 to

R.3, R.3 cancelled the certificate and as per Clause 15 of G.O.Ms.No. 94, referred to above, and clarification given by COT vide letter No.COT/EE1/DEE1/T5/Tender Clar/2005, dt.17-12-2005.

16. In W.P.No.19044/2006 apart from the Engineer-in-Chief, Major Irrigation and the Superintending Engineer, Irrigation Circle, Ramalingapuram, Nellore, the 3rd respondent also was impleaded. The rejection of the technical bid and refusal to open the price bid resulting in selection of the 3rd respondent had been called in question on certain grounds by the writ petitioner. It is stated that by unreasonable and irrational rejection of the petitioner's technical bid, the 2nd respondent acted in contravention of the principles indicated by the Government in their G.O.Ms.No. 94, Irrigation & C.A.D. (PW-COD) Department. It is stated that the said action of R.1 and R.2 is opposed not only to the principles of natural justice but it is also opposed to the orders passed by this Court in W.P.M.P.No.11143/2006 in W.P.No.8752/2006. It is stated that the tenders were invited by way of e-procurement in I & C.A.D. Department through the 2nd respondent in respect of three works viz., (1) Formation of right side flood bank of Mamidi Kalva from Chain 0.00 meters to 1200 meters near Gollapalem (v) in

Ozili Mandal of Nellore District for an estimated contract value of Rs.77,97,580/-;(2) Mamidi Kalva Flood Bank from 0.00 metres to 1600 meters near Papireddy Kandrika in Ozili Mandal of Nellore District for an estimated contract value of Rs.1,28,37,226/-; and (3) Mamidi Kalva Flood Bank near Graddagunta from 0.00 meters to 1200 meters for an estimated value of Rs.62,57,187/- and all the three works are under common IFB No.3/2006-2007 dated 24-5-2006. It is also stated that in all the three matters the period within which the work is to be completed is 6 months and form of contract is stated to be LS (lumpsum) and the procurement is on the basis of open bidding type. It is further stated that every tenderer is to offer bid security if the authorities specified therein by way of drawing Bank Guarantee in favour of such authority. It is also further stated that in all the three works, bid document down loading starts from 12-6-2006 at 5.00 p.m., and down loading ending to be at 5.00 p.m, on 26-6-2006 and the last date and time was notified to be 27-6-2006 at 3.00 p.m., and the technical bid opening date was notified as 28-6-2006 at 11.00 a.m., and the price bid opening was also notified to be 3-7-2006 and thus the dates are specified and schedule is notified in respect of the tender notifications, yet the schedule could not be carried out in

the context of intervention of elections to the local authorities. It is also stated that as a result, the technical bid opening took place only at the end of 2nd week of August, 2006 and thereafter the price bid opening also took place on 8-9-2006. It is also stated that when the technical bids are opening, the petitioner was found to have been not qualified and his technical bid was rejected and as a result on having rejected the other bidder's technical bid also, the 1st and 2nd respondents found the respondent No.3 was the only tenderer qualified and eligible to get the price bid opened. It is further stated that on opening the price bid of the only available tenderer viz., the 3rd respondent, the official respondents appears to have approved the tender of the 3rd respondent. It is also further stated that on the whole there are only 3 bidders including the petitioner. It is also stated that the other bidder Mr.Ramesh was also found not qualified and the petitioner was found to have not satisfied the criteria of experience. It is further stated that the experience certificate filed by the petitioner was considered to have been not eligible to satisfy the criteria prescribed. It is also further stated that the qualification criteria is prescribed in G.O.Ms.No. 94, specified above, and in order to qualify for award of contract, each bidder should have experience of

having completed similar works of value not less than 50% of the estimated value of the contract in any one year in a period of preceding 5 financial years and he must have executed in any one year the minimum quantities of work referred to in clause (b) of qualification criteria. Para 11 of the G.O. refers to the bid capacity and para 15 of the said G.O., provides for experience certificate to be obtained by those contractors who discharged the execution of work as sub-contractors under a prime contractor in whose name the work was awarded. It is also stated that a person to whom a work is awarded is known as prime contractor and the person who executes such awarded work of the prime contractor is known as sub-contractor, but it has to be entrusted only with such person having required experience satisfying the criteria for the execution of works. It is stated that, that is how the officials will have to approve on their satisfaction as to the capability of the execution of the work in question by the sub-contractor and the sub-contractor may be by himself a registered contractor and he may be otherwise entitled to be entrusted with the work by way of prime contractor. It is further stated that the experience gained is sought to be distributed amongst the prime contractor in whose name the work was awarded and the other contractor who executed the work successfully as a sub-contractor. It is

further stated that in this context 50% of the contract value can be executed by a sub-contractor with the approval of the Government and to that extent the prime contractor is not entitled to add to his experience of that quantity of work executed by the sub-contractor and such quantity shall not exceed 50% of total estimated value of the contract in question and thus the experience gained by the sub-contractor is that of the prime contractor and the prime contractor is deprived of 50% of the experience criteria and it is allowed to be transferred to another contractor who acted as sub-contractor under the prime contractor. It is also further stated that thus the sub-contractor gains experience with reference to the approval of the sub-contract which was allowed to be executed by the sub-contractor on behalf of the prime contractor and this is the legal position. It is also stated that while so, in respect of Tender Notice No.1144/ONG/WSS/SST/G2/2003, dated 11-3-2003 issued by the Superintending Engineer, Public Health, Nellore, M/s.Larson & Tubro Ltd., (L&T Ltd.) was awarded the work and the said work was entrusted with the petitioner by way of sub-contract and that was the construction of 3850 ML capacity Summer Storage of Water of Depth 10.85 meters at Ongole with all ancillary

works. It is further stated that the expected contract value was Rs.9,59,03,787-20 at 4.20% less than the estimated value put to tender and this work was also to be executed in 9 months and thus the L&T Ltd., permitted the petitioner by way of sub-letting to execute the work. It is stated that orders were issued by the concerned Superintending Engineer, Public Health, Nellore in his proceedings No.1144/ONG/WSS/SST/DB/D2/2003, dt.11-11-2003 and thus the petitioner was permitted to get the 50% of the value of works and its quantities from the prime contractor. It is also stated that the petitioner was directed to contact the Executive Engineer, Public Health, Nellore, to obtain experience certificate accordingly after completion of the above work. It is further stated that on the request of the petitioner, the Superintending Engineer concerned had issued the experience certificate in the light of para 15 of the G.O.Ms.No. 94, I & C.A.D., dt.1-7-2003. Proceedings No.1144/ONG/W.S.S./S.S.Tank/DB/D2/2003, dated 11-11-2003 reads as hereunder:-

GOVERNMENT OF ANDHRA PRADESH
PUBLIC HEALTH & MUNICIPAL ENGINEERING DEPARTMENT
Proceedings of the Superintending Engineer, Public Health Circle, Mulapet, Nellore.

Present: Sri P.V.SUDHAKAR RAO, B.E.,
Superintending Engineer, Public

Health,

Nellore.

Proceedings No.1144/ONG/W.S.S./S.S.Tank/DB/D2/2003, dated 11-11-2003

Gentleman,

Sub: Ongole Water Supply Improvements Scheme –

Construction of 3850 M.L. Capacity IInd S.S.Tank – Sub-let the work – Orders issued – Regarding.

Ref: 1. Engineer-inChief (PH), Hyderabad work order

No.5998/T4/ONG(W)/Vol.XIII/03, dated 24-4-2003.

2. M/s.Larsen & Toubro Ltd., Hyderabad consent

letter (Work Order) No.4001, dated 2-5-2003.

3. G.O.Ms.No. 94, I & C.A.D. (PW.COD) Department

dated 1-7-2003.

4. Your letter dated 7-11-2003.

-: o0o :-

The above subject work was entrusted to M/s.Larsen & Toubro Ltd., Hyderabad by the Engineer-in-Chief, Public Health, Hyderabad vide referenced 1st cited for an amount of Rs.9,59,03,787.20 at 4.20% less than the estimated value.

The above agency has concluded the agreement with the Superintending Engineer, Public Health Circle, Nellore vide Agreement No.20/2003-2004, dated 12-6-2003.

The prime contractor of M/s.Larsen & Toubro Ltd., Hyderabad has given their consent (i.e., work order)

letter to sublet the above work to Sri M.Venkatasubbaiah, Contractor, Nellore vide their work order No.4001, dated 2-5-2003 vide reference 2nd cited.

Sri M.Venkata Subbaiah, Contractor, Nellore, is a Special Class Contractor (Civil) and he has requested to issue experience certificate as per clause 15 of Annexure-I of G.O.Ms.No. 94, I & C.A.D. (PW) Department, dated 1-7-2003 in the reference 4th cited the total value of work to be awarded on sub-letting shall not exceed 50% of contract value.

According to the above G.O., the Contractor Sri M.Venkatasubbaiah, Nellore is hereby permitted to get the 50% of value of works and its quantities of the above work from the Prime Contractor. The Sub-let Contractor is advised to contact the Executive Engineer, Public Health, Ongole, to obtain the Experience Certificate accordingly after completion of the above work.

The Prime Contractor, M/s.L&T, Hyderabad is held responsible for completion of the above work as per terms and conditions of the agreement.

Yours faithfully,
Sd/-
(P.V.SUDHAKARA RAO)
Superintending Engineer,
Public Health, Nellore.

To
Sri M/Venkata Subbaiah,
Contractor, Nellore.

It is also stated that while so, M/s. L&T Ltd., who happened to be the original contractor made an application to the Engineer-in-Chief, Public Health Department requesting the petitioner to treat the certificate issued by the Superintending Engineer, Public Health,

Nellore, as null and void and to cancel the same and they also requested for issuance of experience certificate to L&T Ltd itself. The letter addressed by L&T Ltd., reads as hereunder:-

LARSEN & TOUBRO LIMITED
Engineering Construction & Contracts Division
Regional Office: 6-3-1109/1, Navabharat Chambers,
Rajbhavan Road, Somajiguda,
Hyderabad -82.
Tel: +91-40-2340 6963/64, Fax: +91-40-2340 6962
L & T : ECCD:HYRO:WET:4001
Date: March 29, 2006

The Engineer-in-Chief,
Public Health,
A.C.Guards,
Hyderabad – 500 004.

Dear Sirs,

Sub: Ongole Water Supply Improvements Scheme –
HUDCO Ph.III – Construction of 3850 M.L.Capacity 2nd Summer Storage Tank at Ongole with all ancillary works of water depth 10.85 meters – Experience Certificate reg.
Ref: Agreement No.SE(PH) Agt No.20/2003-2004, dated
12-6-2003.

This has reference to the above mentioned subject and agreement. We would like to bring to your kind notice that we have executed and completed the above said work long back and our "Defects Liability Period" (DLP) is also getting completed in a month's time.
In this regard, we understand, an experience certificate has been issued to M/s.M.Venkata Subbaiah by the Executive Engineer, PH, Ongole and countersigned by the

Superintending Engineer, PH Circle, Nellore for the same said work.

Now we would like to make it very clear that we have not given any official subletting to M/s.M.Venkata Subbaiah or to any other contractor in writing to the Department.

Hence, the certificate issued by the Department shall be made null and void by cancelling the same.

Also we request to kindly arrange to issue the experience certificate on Larsen & Toubro Limited, ECC Division's name mentioning all the executed quantities and value.

Thanking you and assuring you of our best services at all times, we remain.

Yours faithfully,
For LARSEN & TOUBRO LIMITED
ECC DIVISION
Sd/-
(K.MASILAMANI)
REGIONAL PROJECTS MANAGER.'

It is stated that being aggrieved by the cancellation of the experience certificate, the petitioner filed W.P.No.8752/2006 questioning the same on certain grounds and obtained interim order in W.P.M.P. No.11143/2006, as already referred to supra. It is stated that the rejection of the petitioner bid is totally arbitrary and discriminatory and contrary to the mandates indicated in G.O.Ms.No. 94 and contrary to the objective that is sought to be achieved in prescribing the criteria since the respondents are under an obligation to give effect to the orders of this Court and every authority of the Government is obliged to respect the orders of this Court and failure to

consider the order passed before this Court inspite of bringing the same to the notice of the respondents cannot be sustained. It is also stated that the action of the respondents in rejecting the technical bid of the petitioner ignoring the certificate, which the petitioner possessed, is not only arbitrary but also intended to drain out the public funds favouring R.3 to a tune of Rs.65 lakhs. It is also stated that on receipt of tenders and in connection with the verification of the certificates, G.O.Ms.No. 94 provides the procedure in para 8 in connection with the finalization of the tenders. Para 8 reads as hereunder:-

FINALISATION OF TENDERS:

(i) Tenders will be finalized by the EES/SEs for the works costing up to their powers to accord technical sanctions.

(ii) The Chief Engineer shall finalise the tenders upto Rs.2 crore. The tenders for the works costing more than Rs.2 crore will be referred to COT along with Technical Bid evaluation and Price Bid evaluation for consideration. The COT shall scrutinize the tenders submitted by Engineers-in-Chief / Chief Engineers/Project Administrators in accordance with the conditions stipulated in the Tender document and in case of any discrepancy or non-adherence to the conditions, the same shall be communicated which will be binding both on the Tender Concluding Authority and the Contractor. In case of any ambiguity, the decision taken by the COT on tender shall be final.

(iii) Negotiations are not permitted to be conducted at any level.

(iv) The time allowed from the date of publication of

tender notices to the date of receipt of tenders is 14 days for the first call and 7 days for the second call. The tenders will be received following three box system i.e., at SEs Office, Office of the SP of the District where the SE's office is located, and one in the office of the ENC or by post to the SE concerned.

This finalization has to be done by the Chief Engineer in respect of the matters, the estimate of which does not exceed Rs.2 crore. Verification is to be done by affording an opportunity to the other contractors to raise their objections against the experience indicated by the tenders. In fact, the website is expected to be created and maintained by the Commissioner of Tenders wherein the details of all contractors will have to be made available. It is also stated that the existing contractors should submit the details of their experience with an affidavit before the Commissioner of Tenders and the Commissioner of Tenders should place all these details on the website and those having objections should file before the Commissioner of the Tenders within a period of one month from the date of placement of experience particulars on the website. It is further stated that it is open to the Commissioner of Tenders to conduct the investigation on such objections of other contractors against the experience possessed by the contractors in

question. It is also further stated that in fact so far the petitioner's experience is concerned, there has been no such objection that is stated to have been pointed out nor there was any investigation on the part of the respondent authorities to hold that the petitioner not qualified in the light of the certificate issued no doubt is available on record. It is also further stated that so far petitioner's experience and his financial capacity are concerned, there has been no objection that is pointed out by any one, much les by any authority. It is also stated that in the context of such situation, it is unjust and highly arbitrary and discriminatory on the part of the respondent authorities in rejecting the technical bid of the petitioner and in refusing to open his price bid and by not opening the petitioner's bid, an undue boon is conferred upon R.3 to the detriment of the State Public Funds. It is further stated that therefore the entire file, if to be called for, this Court would appreciate the petitioner's submissions that how the respondents 1 and 2 had acted arbitrarily and in a discriminatory manner, detriment to the State Public Funds as well as to favour respondent No.3. It is also further stated that the respondents No.1 and 2 being the public authorities, they are not expected to exercise their administrative power in the manner detrimental to the State Funds and to the advantage of any individual

person and if such action is to be allowed to remain that would facilitate the State to loose their efficacy of control and therefore, in the light of the provisions contained in Article 14 of the Constitution of India, there is absolutely necessity to call for the records and to find out the arbitrary and discriminatory action on the part of the respondent authorities in awarding contract to the respondent No.3. It is also further stated that if once the entrustment is made, thereafter it may not be possible to rectify the defects or illegalities committed by the respondents.

17. It is pertinent to note that L&T Limited, though made a party in W.P.No.8752/2006, in the present Writ Petition, may be for the reason that the same is unconcerned with this controversy, the said party is not shown as party. It may also be noted that M/s.L&T Limited shown as R.4 in W.P.No.8752/2006, though represented by a Counsel, the learned Counsel as such had not advanced any arguments and would submit before the Court that there are no further instructions from the client.

18. The experience certificate and contents thereof which had been produced before this Court being self-explanatory, the same need not be explained further and there cannot be any two opinions that this certificate

would confer certain rights on the writ petitioner.

19. In the counter affidavit filed by R.1, the Engineer-in-Chief, Irrigation, Erramanzil, Hyderabad, it is stated that the Government had issued comprehensive orders for streamlining the Tender Process in the State vide G.O.Ms.No.94, Irrigation & C.A.D. (PW-COD) Department dt.1-7-2003. It is also stated that accordingly the Department had stipulated certain conditions while inviting tenders for qualifying the Bidders for opening their Price Bids and the qualification criteria as per the G.O. is extracted below:-

A) To qualify for award of the Contract, each bidder in his name should have during the last five years (specified financial years i.e., they should be immediately preceding the financial year in which tenders are invited)

a) Satisfactorily completed as a Prime Contractor, similar works of value not less than ……../ @ (usually not less than 50% of estimated value of contract) in any one year.

b) Executed in any one year, the following minimum quantities of works:

- Cement Concrete including RCC and PSC ….. …… Cu.M.

- Earth work in both excavation and Embankment…..Cu.M.

- (relevant principal items be indicated)

<u>BID CAPACITY</u>

(a) The Sub-Contractor's/G.P.A.Holder's experience shall not be taken into account in

determining the bidder's compliances with the qualifying criteria. The tenderers, who meet the requirement qualification criteria will be qualified only, if their available bid capacity is more than the Estimated Contract Value. The available bid capacity will be calculated as under:

Assessed Available Bid Capacity = A X N X 2 – B

Where

A=Maximum value of Ckivil Engineering works executed in any one year during the last five years (updated Price…. Level) taking into account the completed as well as works in progress.

N=Number of years prescribed for completion of the work for which tenders are invited.

B=Value of existing commitments and ongoing works to be completed during the period of completion of works for which tenders are invited.

It is also stated that the relevant clause with regard to sub-contract is 15 and the same had been referred to. It is also further stated that under the procedure laid down for opening the Tenders, the Tender of the petitioner is not qualified and hence the Price Bid of the petitioner was not opened. It is also stated that further, the petitioner is claiming that if his Price Bid is opened, there would have been a difference of about Rs.65.00 L between his bid

price and the bid price of the 3rd respondent and that it is arbitrary, baseless and cannot be accepted, because the process of 'e' procurement tenders is completely Secrete/confidential and it cannot be tapped in any way as the System is governed by the 'e' procurement platform guarded by the Government. It is also further stated that the tendering process is completely guided by the principles laid down in the G.O.Ms.No. 94 Irrigation & C.A.D. (PW-COD) Department dated 1-7-2003 and at any stage of processing of tenders, the Department did not act in contravention of the principles indicated in the said G.O. and this respondent is not aware of any orders passed by this Court in W.P.M.P.No.11143/2006 in W.P.No.8752/2006 dt.8-6-2006. It is also stated that tenders were invited in the respondent office 'e' procurement Tender Notice No.3/2006-07, dt.24-5-2006 for the following 3 works:-

1) *Formation of right side flood bank to Mamidi Kalva form Ch. 0 M to Ch. 1200 M near Gollapalem (v), in Ozili Mandal at an estimated contract value of Rs.78.00 L.*
2) *Formation of right side flood bank to Mamidikalva form Ch. 0 M to Ch. 1200 M near Graddagunta (v) in Ozili Mandal at an estimated contract value of Rs.62.60L &*
3) *Formation of right side flood bank to Mamidi Kalva form Ch. 0 M to Ch. 1600 M near*

Papireddykandrika (v) in Ozilli Mandal at an estimated contract value of Rs.128.40 L.

It is also further stated that while inviting tenders, the following conditions are stipulated in the Tender Notice for Qualifying the Bidders:

A) The Bidder should be a registered contract under
G.O.Ms.No. 178, dt.27-9-1997 – Class – II Civil and above or
G.O.Ms.No. 132, dt.11-8-1998 – Class – II Civil and above or
G.O.Ms.No. 94, dt.1-7-2003 – Class – III Civil and above.

Under general terms and conditions the following essential conditions have to be fulfilled.

1) *The Bidder should be registered under VAT Act.*
2) *The bidder should have a PAN number from the Income Tax Department and he should have submitted the latest I.T.Return*
3) *The bidder should pay the sum as specified for each work as Earnest Money Deposit.*
4) *The bidder should pay the sum specified for each work to M/s. C.1 India Pvt. Ltd., Hyderabad.*

It is further stated in para 7 of the counter affidavit that the Qualification criteria for each work as specified below:

(1) <u>Name of Work:- Formation of right side flood bank to Mamidikalva form Ch. 0 M to Ch. 1200 M near Gollapalem(v) in Ozili Mandal</u>

Condition	***Amount/ Quantity***
(A) To qualify for award of the contract, each bidder in the same name and style should have good experience in execution as Original Agency in similar works in the State and Central Government Undertakings during the last five financial years from 2001-02 to 2005-06. *(a) Satisfactorily completed, as a Prime Contractor similar works of value:*	*Rs. 78.00 Lakhs*
(b) Executed in any one financial year the following quantities of works: *Earth work excavation:* *Revetment:* *Cement Concrete:*	*76,600 Cu.M.* *292 Cu.M* *202 Cu.M.*
(C) Bid Capacity: The Sub-Contractor's/G.P.A. Holder's experience shall not be taken into account in determining the bidders qualification criteria. The tenderers, who meet the requirement qualification criteria will be qualified, only if their available bid capacity is more than the Estimate Contract Value: *The available bid capacity will be as under Assessed Bid Capacity = A X N X 2 – B* *Where A = Maximum value of works executed in a single year* *B= Value of existing commitments* *N=Number of years prescribed for completion of work*	*Rs.77.98 Lakhs*

(2) Name of Work:- Formation of right side flood bank to Mamidikalva form Ch. 0 M to Ch. 1200 M

near

Graddagunta (v) in Ozili Mandal

Condition	***Amount/ Quantity***
(A) To qualify for award of the contract, each bidder in the same name and style should have good experience in execution as Original Agency in similar works in the State and Central Government Undertakings during the last five financial years from 2001-02 to 2005-06.	
(a) Satisfactorily completed, as a Prime Contractor similar works of value:	*Rs.62,60,000/-*
(b) Executed in any one financial year the following quantities of works:	
Earth work excavation:	*64,600 Cu.M.*
Revetment:	*292 Cu.M*
Cement Concrete:	*202 Cu.M.*
(C) Bid Capacity: The Sub-Contractor's/G.P.A. Holder's experience shall not be taken into account in determining the bidders qualification criteria. The tenderers, who meet the requirement qualification criteria will be qualified, only if their available bid capacity is more than the Estimate Contract Value:	*Rs.62,57,187/-*
The available bid capacity will be as under Assessed Bid Capacity = A X N X 2 – B	
Where A = Maximum value of works executed in a single year	
B= Value of existing commitments	
N=Number of years prescribed for completion of work	

(3) Name of Work:- Formation of right side flood bank to Mamidikalva form Ch. 0 M to Ch. 1600 M near Papireddykandrika (v) in Ozili Mandal

Condition	***Amount/ Quantity***
(A) To qualify for award of the contract, each bidder in the same name and style should have good experience in execution as Original Agency in similar works in the State and Central Government Undertakings during the last five financial years from 2001-02 to 2005-06.	
(a) Satisfactorily completed, as a Prime Contractor similar works of value:	*Rs.128.40 Lakhs*
(b) Executed in any one financial year the following quantities of works:	
Earth work excavation:	*1,23,500 Cu.M.*
Revetment:	*292 Cu.M*
Cement Concrete:	*202 Cu.M.*

(C) Bid Capacity: The Sub-Contractor's/G.P.A. Holder's experience shall not be taken into account in determining the bidders qualification criteria. The tenderers, who meet the requirement qualification criteria will be qualified, only if their available bid capacity is more than the Estimate Contract Value: *The available bid capacity will be as under* *Assessed Bid Capacity = A X N X 2 – B* *Where A = Maximum value of works executed in a single year* *B= Value of existing commitments* *N=Number of years prescribed for completion of work*	*Rs.1,28,37,226/-*

It is also stated that the tenders were received up to the target date and time i.e., 27-6-2006 and due to enforcement of Election Code, the opening of Technical Bids was postponed. It is further stated that the Technical Bids of the bidders were opened on 9-8-2006 and it is found that three bidders have submitted their bids in the 'e' procurement tenders namely – 1) N.Ramesh Kumar, Nellore, (2) V.Ramanjaneya Reddy, Nandyal, and (3) M/s. M.Venkata Subbaiah, Nellore. It is also further stated that during the opening of the Technical Bids of the petitioner in the following details were noticed from the Experience Certificate produced by him. The details of the Experience Certificate are given below:-

1) Name of the Work:- Construction of 3850 material capacity 2nd S.S.Tank in Ongole.
2) Name of the Prime Contractor on whose name the Agreement was concluded by the Superintending Engineer, Public Health Circle, Nellore: M/s. Larsen & Toubro Ltd., Hyderabad.
3) Agreement No.: 20/2003-04, dt.12-6-2003.
4) But the Executive Engineer, P.H. Division, Ongole had issued the experience certificate on the above work in such a way that the work was executed by the Prime Contractor – M/s.Larsen & Toubro Ltd., Hyderabad and the petitioner at 50% of the work by each one of the two. Further, the petitioner was named as the Sub-Contractor for executing the 50% of the work.

Further it is stated in para 9 that as per the Qualification Criteria stipulated in clause No.1.3 A (a) of the Tender Notice and Information To Bidders (Page No.10 of Tender Schedule) “To qualify for award of the contract, each bidder in the same name and style should have good experience in execution as Original Agency in similar works in the State and Central Government Undertakings during the last five financial years from 2001-02 to 2005-06. It is also further stated that under clause 1.3 A (a) “Satisfactorily completed, as a Prime Contractor, similar works of value (given for each work separately), but, from the experience certificate, it is evident that the work was entrusted to M/s.Larsen & Toubro Ltd., Hyderabad on tender basis and hence the Prime Contractor is

M/s.Larsen & Toubro Ltd., Hyderabad only and therefore, the petitioner had failed to satisfy this condition as he had not executed the work as a PRIME CONTRACTOR. It is also further stated that under Clause No.1.3(C) of the Tender Notice and Information to Bidders (Page No.11 of Tender Schedule), "the Sub-Contractor's/G.P.A. Holder's experience shall not be taken into account in determining the bidder's qualification criteria and therefore, the petitioner's experience certificate cannot be valid for this purpose also and hence, under the above two parameters, the petitioner had not satisfied the stipulated conditions and thus he was not qualified and his tender was not considered for the next stage i.e., Financial Bid. Further specific stand is taken that as per the procedure laid down in the tender schedule, the petitioner was dis-qualified and therefore, the action of the Department in not qualifying the Tender of the petitioner is as per the Tender conditions. It is also further stated in para 12 of the counter affidavit that a report was submitted to the Commissioner of Tenders, Hyderabad vide Office letter No.DB/ATO 3/ Mamidikalva/1079 M, dt.26-8-2006 seeking the clarification on the validity of the Experience Certificate submitted by the petitioner along with his tenders and the Commissioner of Tenders in their letter No.COT/EE 1/DE 1/T 5/Tender Clar/2006, dt.30-8-2006 informed that:-

(1) Clause – 15 of G.O.Ms.No. 94, Irrigation and CAD (PW-COD) Department, dt. 1-7-2003 states as under: "If the contractor desires to Sub-let a part of the work, he should submit the same at the time of filing the Tenders itself or during execution, giving the name of the proposed Sub-Contractor, along with the details of his qualification and experience. The Tender accepting authority should verify the experience of the Sub-Contractor and if the Sub-Contractor satisfies the qualification criteria in proportion to the value of work proposed to be sub-let, he may permit the same. The total value of works to be awarded on sub-letting shall not exceed 50% of contract value. The extent of sub-letting shall be added to the experience of the Sub-Contractor and to that extent deducted from that of the main contractor.

(2) The sub-letting experience can also considered provided the sub-letting is done as specified in G.O.Ms.No. 94, dt.1-7-2003. Subsequently, this Office addressed the Engineer-in-Chief, Public Health Engineering, Hyderabad on the procedure based on which, the work was sub-let to M/s.M.Venkata Subbaiah, the petitioner vide this Office letter No.DB/ATO 3/Mamidikalva/1104 M, dt.31-8-2006. The Engineer-in-Chief, Public Health, Hyderabad had informed vide his letter No.5998/T4/ONG (W)/Vol.XVIII/2006, dt.1-9-2006 to contact the Superintending Engineer, Public Health Engineering, Nellore for clarification on the experience certificate, since the certificate was issued by the Executive Engineer, Public Health Engineering, Ongole and the Superintending Engineer, Public Health Engineering, Nellore countersigned the certificate.

It is further stated that latter, this office addressed the Superintending Engineer, Public Health Engineering Circle, Nellore vide this Office letter No. DB/ATO

3/Mamidikalva, dt.2-9-2006 for clarification and the Superintending Engineer, Public Health Engineering Circle, Nellore had informed vide his letter No.1144/2nd SS Tank/DB/D2/2006, dt. 6-9-2006 stating that:-

1) *"The lowest tender of M/s.Larsen & Toubro Ltd., Hyderabad for the above work was accepted by the Tender Committee for Rs.9,59,03,787/- and the work was entrusted to M/s.Larsen & Toubro Ltd., Hyderabad by the Engineer-in-Chief, Public Health, Hyderabad and the Agreement was concluded by the Superintending Engineer, Public Health Engineering Circle, Nellore, vide Agreement No.20/2003-04 dt.12-6-2003.*
2) *The Firm M/s.Larsen & Toubro Ltd., Hyderabad had in turn issued Work Order to M/s.M.Venkata Subbaiah, Contractor, Nellore vide their work order No.4001, dt.2-5-2003. Accordingly, the then Superintending Engineer, Public Health Engineering Circle, Nellore had issued subletting order of the work to M/s.M.Venkata Subbaiah, Contractor, Nellore vide his letter No. 1144/2nd SS Tank/DB/D2/2006 dt.11-11-2003 as per G.O.Ms.No. 94.*
3) *The Executive Engineer, Public Health, Ongole had issued Experience certificate to M/s.M.Venkata Subbaiah, Contractor, Nellore for 50% of the executed quantities of the work.*
4) *The Firm M/s.Larsen & Toubro Ltd., Hyderabad had raised objection and requested the Executive Engineer, Public Health, Ongole not to issue experience certificate to M/s.M.Venkata Subbaiah, Contractor, Nellore since the above work was not sub-let by them.*
5) *Due to their representation, the experience certificate issued to M/s.M.Venkata Subbaiah, Contractor, Nellore was cancelled by the Executive Engineer in his letter No. OBTAINING/2nd SS Tank/DB/D1/2006, dt.6-4-2006.*

It is further stated that the information furnished by the Superintending Engineer, Public Health Engineering Circle, Nellore revealed that:-

1) *The tender of the lowest tenderer, M/s.Larsen & Toubro Ltd., Hyderabad was accepted by the Tender Committee and the work was entrusted to the Firm by the Committee.*

2) *The Prime Contractor M/s.Larsen & Toubro Ltd., Hyderabad had concluded the Agreement with the Superintending Engineer, Public Health Engineering Circle, Nellore on 12-6-2003 vide Agreement No.20/2003-04, thereby issuing of work order to M/s.M.Venkata Subbaiah, Contractor, Nellore on 2-5-2003 had no validity, because the Firm would not be the Contractor unless it executes the Agreement with the Department concerned.*

3) *As per the procedure laid down for sub-letting the work in the G.O.Ms.No. 94, dt.1-7-2003, the Tender Accepting Authority, i.e., Tender Committee in this case, has to be addressed for sub-letting the work by the Firm through the concerned Superintending Engineer, the experience of the sub-let contractor has to be verified by the Committee and if the Committee satisfies with the qualifications of the sub-let contractor, will issue orders for sub-letting the work. Until then, no work should be sub-let to anybody. In the present case, it is informed that, the then Superintending Engineer, Public Health Engineering Circle, Nellore while quoting an old letter of the Firm, had issued Sub-let Orders of the work to M/s.M.Venkata Subbaiah, Contractor, Nellore on 11-11-2003 which is not correct and Lawful and against the procedure laid down in the G.O.Ms.No. 94, dt.1-7-2003. Inasmuch as the Superintending Engineer, Public Health Engineering Circle, Nellore, having no authority/powers, had issued the orders subletting the work to the petitioner, the*

order is null & void. There is no dispute in it.

4) *After learning all these things regarding the sub-letting of the work, the prime contractor, M/s.Larsen & Toubro Ltd., Hyderabad, had informed the Engineer-in-Chief, Public Health, Hyderabad vide their letter dated 29-3-2006 that "the Firm would like to make it very clear that the Firm had not given any official sub-letting to M/s.M.Venkata Subbaiah, Contractor, Nellore or to any other contractor I writing to the Department. Further, the firm requested the Engineer-in-Chief to make the experience certificate NULL & VOID by cancelling the same. The Firm also requested to issued experience on their own name only for all the executed quantities."*

5) *Accordingly, the Executive Engineer, P.H. Division, Ongole had issued cancellation orders of the Experience Certificate issued by him on 6-2-4006.*

It is stated that from the sequence of action referred to supra, it is evident that the sub-letting was not done to the petitioner as per the procedure laid down in the G.O.Ms.No. 94 dated 1-7-2003 on the grounds that the Prime Contractor had not proposed any sub-letting of work to the Department/Tender Committee and the Department/Tender Committee had not issued any sub-letting orders and thereby the sub-letting orders issued by the then Superintending Engineer are not valid and unlawful. It is also stated that since the firm denied sub-letting proposals, the action of the Department in sub-letting is also not lawful. It is also further stated that on hearing from the Firm, the Executive Engineer,

P.H.Division, Ongole had issued the cancelling orders of the Experience Certificate vide his letter No.Ong/2nd S S Tank/DB/D 1/2006/263 M, dt.6-4-2006. It is stated that therefore, in the light of the above, it is established that the experience certificate had no validity at all and the action of this respondent in not qualifying the Tender of the petitioner is as per the conditions and procedure of the Department. It is further stated that the Department after making detailed study into the procedure of the Tendering had approved the 'e' procurement Tender System, which will be run automatically through Internet System maintained by the C 1 India Pvt. Ltd., Hyderabad and secrecy will be maintained at every step and no leakage of information will be found until the Tendering process is completed and the work is awarded to the Lowest Bidder, after which every thing will be open to all other bidders also. It is further stated that unless Price Bids are opened, no one knows about the quoted prices and the figures given can be only imaging and without any basis and therefore, there is no flaw in the 'e' procurement system and the plea of the petitioner is arbitrary and discriminatory. It is further stated that the Department will act as per the procedure laid down in G.O.Ms.No. 94, dt.1-7-2003 and award the works to those bidders only, who

are confirmed as Qualified by the competent authority. No doubt, relief was prayed for to vacate the interim order.

20. In the counter affidavit filed by R.3, clause 15 of G.O.Ms.No. 94 had been referred to and specific stand is taken that the alleged work is done by the petitioner under the prime contractor M/s.Larsen & Toubro Ltd., Hyderabad is not in compliance with clause 15 of G.O.Ms.No. 94 and further it was specifically denied that the official respondents acted only to favour R.3 and to drain out public funds to a tune of Rs.65 lakhs and other averments made in the affidavit filed in support of the Writ Petition also had been denied though not in detail but in a brief and short form. It is needless to say R.3 being only a contractor, virtually, had adopted the stand taken by R.1 in the counter affidavit.

21. As already referred to supra, M/s.Larsen & Toubro Ltd., Hyderabad – the 4th respondent in W.P.No.8752/2006 is a non-party in the subsequent Writ Petition. However, the learned Counsel representing R.4 had stated that he had no further instructions in the matter. It may be that R.4 in W.P.No.8752/2006 intended to have advantage of these works to its own benefit and to the detriment of the interest of the writ petitioner and it is needless to say that several of the facts if to be

controverted, it is the concern of R.4 to take a specific stand in this regard if R.4 is interested in having the total benefit of the works to its advantage and to the disadvantage of the writ petitioner. But for reasons best known to R.4, R.4 is not seriously contesting and on the strength of the communication said to have been sent by R.4, the impugned action had been taken.

22. Certain submissions are made on the aspect of the maintainability of the Writ Petition on the ground that several disputed questions of fact are involved in the matter. The impugned action of cancellation of the experience certificate is being questioned on several grounds, principally on the grounds of the violation of principles of natural justice and the action being arbitrary, violative of Article 14 of the Constitution of India. In ***ASSISTANT EXCISE COMMISSIONER AND OTHERS v. ISSAC PETER AND OTHERS***[1] while dealing with the doctrine of reasonableness and fairness it was held:

> *"The duty to act fairly cannot be sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. The Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action*

is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. That is so, even if the contract is governed by statutory provisions i.e., where it is a statutory contract – or rather more so. It is one thing to say that a contract – every contract – must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly cannot be appreciated.

I n ***M/s.MONARCH INFRSTRUCTURE (P) LTD., v. COMMISSIONER, U.M.C.***[2] it was held that *in a term of tender is deleted after the players entered into the arena it is like changing the rules of the game after it had begun and therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process*

of tender was the only alternative permissible, by reason of deletion of a particular condition the wider net will be permissible and a larger participation or more attractive bids could be offered."

23. The learned senior Counsel Sri M.R.K.Chowdary placing reliance on a couple of decisions would maintain that inasmuch as the challenge is being raised both on violation of principles of natural justice and also on the ground that the action is an arbitrary action being violative of Article 14 of the Constitution of India, the Writ Petitions cannot be thrown out on the ground of non-maintainability. The contention that several disputed questions of fact are involved cannot be a sustainable contention for the reason that R.4 who is expected to deny or dispute, if at all if the said party is interested in the lis, had not chosen to do so. Hence, most probably the arena of the controversy is only in relation to the competency of the Superintending Engineer or the competency of the Tender Committee or whether the impugned action is in violation of the principles of natural justice or in violation of Article 14 of the Constitution of India. On a careful analysis of the whole factual matrix and in view of the close nexus, it is needless to say that the result of the second Writ Petition W.P.No.19044/2006

would depend upon the result of the first Writ Petition W.P.No.8752/2006.

24. In ***STATE OF BIHAR v. SUBHASH SINGH***[3] while dealing with administrative action and judicial review it was observed as hereunder:-

> *"He challenged that order of dismissal by filing a Writ Petition in the High Court of Madras. That petition was subsequently transferred to the Tamil Nadu Administrative Tribunal and was numbered as T.A.No.606 of 1991. The respondent challenged his dismissal on the ground that the inquiry and the dismissal order were vitiated as the disciplinary proceedings were initiated against him by an officer subordinate in rank to the disciplinary authority. It was also challenged on the ground that he not appearing before the Medical Board, the respondent cannot be said to have disobeyed the order of the superior authority and in any case, that did not amount to a misconduct of grave nature. It was also challenged on the ground that the enquiry officer, by denying him the documents which he wanted, deprived him of a reasonable opportunity to defend himself. The Tribunal, relying upon its earlier Judgment, held that the disciplinary authority alone can initiate a disciplinary proceeding against a Government servant under Rule 3 (b) of the said Rules and as the charge-memo in this case was issued by an officer subordinate to the disciplinary authority the entire disciplinary proceeding stood vitiated.*

The Tribunal also held that the applicant wanted a railway warrant to enable him to appear before the Medical Board at Trichy and as the same was not given to him he cannot be said to have disobeyed the order of a superior authority. For that reason and also on the ground of absence of any provision under which non-appearance before a Medical Board can be considered as an act of misconduct the Tribunal held that there was no justification for initiating a disciplinary proceeding against him. The Tribunal also held that the enquiry officer by denying his request to have the documents which he had asked for and for perusal of a file had deprived him of a reasonable opportunity to defend himself. The Tribunal also held that as the applicant was not given a copy of the inquiry report and as the order was passed without giving him a further notice his dismissal has to be regarded as bad. The Tribunal, therefore, quashed and set aside the order of dismissal."

Reliance also was placed on ***TATA CELLULAR v. UNION OF INDIA***[4] wherein the Apex Court while considering Article 229 of the Constitution of India and the requirements of the Tender held as hereunder

"*A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated, the following are the requisites of a valid tender:*

1. *It must be unconditional*

2. *Must be made at proper place.*
3. *Must conform to the terms of obligation.*
4. *Must be made at the proper time.*
5. *Must be made in the proper form.*
6. *The person by whom the tender is made must be able and willing to perform his obligations.*
7. *There must be reasonable opportunity for inspection,.*
8. *Tender must be made to the proper person.*
9. *It must be of full amount.*

While dealing with the interference by Courts in relation to the grant of Government contracts in the context of Article 14 of the Constitution of India and the aspect of public interest and *mala fides*, the Apex Court in ***RAUNAQ INTERNATIONAL LTD., v. I.V.R.CONSTRUCTION LTD.***[5] observed at para 11 as hereunder:-

> *"When a Writ Petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial*

transaction. It is important to bear in mind that by Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the Court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the Court should not intervene under Article 226 in disputes between two rival tenderers."

25. It is needless to say that in both these Writ Petitions interim orders had been granted which had been referred to supra. The order impugned in W.P.No.8752/2006 was made by R.3 under the instructions of R.2 and it is stated that it is within the knowledge of R.1 also and evidently the same was made at the instance of R.4 and R.4 is a silent spectator before this Court. By virtue of the experience certificate, the petitioner became eligible to apply for tenders and to offer the tenders quoting the rates. Specific stand is taken that he is the lowest tenderer seeking award of work in respect of Bheemavaram Summer Storage Tank. Further stand is taken that the R.1 to R.3 in W.P.No.8752/2006, on the objection raised by R.4, failed to allot the work to the petitioner though he is otherwise entitled for the same. By virtue of the experience certificate, a right is accrued to the petitioner to

apply for certain tenders and may be that his case may have to be considered on the strength of such certificate. It is pertinent to note that the sub-contract by the petitioner with R.4 had been executed under the supervision and control of R.3 and R.4, and the ground realities as such cannot be denied. An objection is now being taken relating to the competency of the Superintending Engineer on the ground that the said Superintending Engineer is incompetent and on the ground that the Tender Committee alone is competent. It is pertinent to note that for sufficiently a long time R.4 had not evinced any interest but subsequent thereto, for the reasons best known, a letter is said to have been addressed. This Court is of the considered opinion that in a way R.4 is *estopped* from contending otherwise and even R.1 to R.3 cannot try to take shelter under the guise of the letter said to have been addressed by R.4 requesting that the said benefit to be conferred on R.4 and R.4 alone, not recognizing the works carried out by the petitioner. On a careful reading of the impugned action, it appears the experience certificate had been cancelled without putting the petitioner on notice only on the strength of the communication said to have been made by R.4. It appears R.4 had raised the issue in relation thereto only

by way of stating that there has been no written approval obtained by R.4 to sublet the work. There is no denial of the execution of the works by the petitioner and this was done under the supervision of R.1 to R.3 only and on a technical objection raised by R.4, taking advantage of the same, R.1 to R.3 are raising yet another technical objection of competency ignoring all the realities, thus putting the writ petitioner in a total disadvantage and an attempt is being made to deprive him of the opportunity of being successful in finalization of the tenders on the ground that he is not qualified. It is needless to say these are the rights accrued by virtue of the experience certificate already granted to the petitioner and the cancellation thereof would involve civil consequences. No doubt, elaborate submissions were made on the applicability or otherwise of clause 15 referred to supra. These aspects need not detain this Court any longer for the reason that at no point of time the writ petitioner was put on notice and R.4 having triggered the litigation became a silent spectator, virtually, depriving the petitioner of his legal rights which are said to have been accrued to him by virtue of the certificate. This Court is of the considered opinion that this is impermissible in Law and whatever may be the contentions that may be put forth or advanced by the writ petitioner in this regard, it

would be always just and proper to put the writ petitioner on notice in relation to the impugned action if need to be taken in the context of the certificate already issued in his favour and take any other further appropriate decision in this regard. Hence, both on the ground of violation of principles of natural justice and the action being arbitrary action, being violative of Article 14 of the Constitution of India, the writ petitioner is bound to succeed in W.P.No.8752/2006. But, however, inasmuch as this Court is inclined to interfere principally on the grounds of violation of principles of natural justice and arbitrary action, the impugned action of cancellation of the experience certificate is hereby set aside and the matter is remitted to the competent authority to put the writ petitioner on notice, call for his explanation or objections, if any, as against the said action of cancellation, if they are inclined to do so and then pass appropriate orders in this regard.

26. Though several facts are averred in detail in W.P.No.19044/2006 in the affidavit filed in support of the Writ Petition and also the respective counter affidavits, which had been already referred to supra, the specific ground raised is that respondents 1 and 2 in the said Writ Petition are bound to consider the experience certificate produced by the petitioner which is still valid in the light of

the Orders made before this Court in W.P.M.P.No.11143/2006 in W.P.No.8752/2006 dated 8-6-2006. It may be that the interim suspension made by this Court may not *tantamount* to the revival of the certificate as such unless and until appropriate orders are made in this regard. But the fact remains that interim suspension of the cancellation order had been made by this Court and the same to have been taken note of. It would have been just and proper on the part of the R.1 and R.2 to see either the said order is duly vacated or at least the prior W.P.No.8752/2006 is disposed of. Instead, it appears R.1 and R.2 refused to open the Price Bid of the petitioner in respect of the works i.e., (1) formation of right side flood bank of Mamidi Kalva from Chain 0.00 meters to 1200 meters near Gollapalem (v) in Ozili Mandal of Nellore District for an estimated contract value of Rs.77,97,580/-, (2) Mamidi Kalva Flood Bank from 0.00 meters to 1600 meters near Papireddy Kandrika in Ozili Mandal of Nellore District for an estimated contract value of Rs.1,28,37,226/-, and (3) Mamidi Kalva Flood Bank near Graddagunta from 0.00 meters to 1200 meters for an estimated value of Rs.62,57,187/- on rejection of the technical bid of the petitioner on the ground of invalidity of the experience certificate produced by the petitioner.

27. Several clauses in G.O.Ms.No.94, referred to supra,

the terms and conditions agreed upon by the parties, which had been narrated in detail need not detain this Court any further in the light of the fact that the very cancellation of the certificate referred to supra, is being set aside by this Court and the matter is being remitted to the competent authority by virtue of the order made in W.P.No.8752/2006. However, elaborate submissions were made in relation to the scope of the interference and the ambit of judicial review in the realm of contracts. Several facts in detail as reflected from the respective pleadings of the parties already had been referred to above and hence the respective stands need not be repeated again. The main grievance of the writ petitioner is that the petitioner was found to have been not qualified and his technical bid was rejected and technical bid of yet another bidder also had been rejected and the 3rd respondent was only found to be the tenderer qualified and eligible to get the price bid opened. Though the petitioner filed the experience certificate and though he would satisfy eligibility criteria, due to the reasons referred to above it was stated that the petitioner is not eligible. Further the grievance of the petitioner is that the qualification criteria as prescribed in G.O.Ms.No. 94, I & C.A.D., though is being well satisfied by the writ petitioner,

holding that the petitioner is not eligible, in the light of the stand taken by M/s.Larsen & Toubro Ltd., Hyderabad, cannot be sustained. In the counter affidavit filed by R.1, the terms and conditions, the procedural formalities and several other details had been referred to at length. The eligibility criteria, the bid capacity, the qualification criteria and the relevant material papers in relation thereto had been pointed out. There cannot be any doubt, whatsoever that the scope and ambit of interference in relation to the award of Government contracts by Courts would be limited and would lie in a short compass. The said view was expressed in ***M.Srinivasa Reddy v. The Government of A.P., rep. by its Secretary, Irrigation & Command Area Development, Secretariat Blgs, Hyderabad and others***[6]***; R.Sudhakar Reddy v. The Government of A.P., Irrigation & CAD (PW) Department, rep.by its Secretary, Secretariat, Hyderabad and others***[7]***; Madhucon-Sinohydro Joint Venture v. The Government of A.P., rep. by the Principal Secretary to Government, Irrigation and CAD (PPMU) Department, Secretariat, Hyderabad and another***[8]***; R.Subba Raju v. Commissionerate of Tenders, rep.by its Commissioner, and others***[9]***;***

Jaiprakash Industries Ltd., and others v. State of Maharashtra and others [10]***; and K.G.Construction v. Municipal Corporation for Greater Bombay*** [11]***.*** However, this is a case where the petitioner approached this Court by filing W.P.No.8752/2006 and obtained interim suspension of the proceeding relating to the cancellation of the experience certificate by order dated 8-6-2006 in W.P.M.P. No.11143/2006. Inasmuch as the same is being set aside by making appropriate directions in W.P.No.8752/2006, this Court is of the considered opinion that inasmuch as the consideration of these tenders, subject matter of W.P.No.19044/2006, also being dependent on the same, it would be just and proper to direct the respondents to consider the whole issue in the light of the ultimate decision which may be taken in relation to the experience certificate after duly putting the petitioner on notice and it is needless to say that in the light of the said decision which may be taken in relation to experience certificate after considering the explanation or objections which may be raised in this regard by the writ petitioner, the whole issue may have to be re-considered again in the light of the said back-ground and till this exercise is completed, R.1 and R.2 are directed not to further proceed in this regard either by entrusting the

execution of the works in question to R.3 or otherwise. This Court is not inclined to express any opinion relating to the other allegations made in this regard on the ground that such entrustment would be detrimental to the public exchequer in view of the fact that there is no sufficient acceptable material in relation thereto. Accordingly, the action of the 3rd respondent in cancelling the experience certificate issued on 20-6-2005 to the petitioner without notice to the petitioner and at the instance of R.4 is held to be bad, with further direction to R.1 to R.3 or the competent authority to afford opportunity to the petitioner to raise such objections which may be available to him and make appropriate orders in this regard and to the said extent W.P.No.8752/2006 is allowed. Likewise, in W.P.No.19044/2006 R.1 and R.2 are hereby directed not to entrust any of the works, the subject matter of the Writ Petition, to the 3rd respondent, unless and until, the whole issue is reconsidered especially in the light of the decision which may be taken in relation to the experience certificate specified supra and in the event of being satisfied in relation to the eligibility criteria of the petitioner, to consider the case of the petitioner or in alternative to proceed further by calling for fresh tenders, if need be depending upon the facts and circumstances. The Writ

Petition W.P.No.19044/2006 also is hereby allowed to the extent indicated above. The parties in both the Writ Petitions to bear their own costs.

Justice P.S.Narayana

5th January, 2007

Note: L.R. Copy to be marked (YES/NO)
smr

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[1] (1994) 4 S.C.C., 104
[2] AIR 2000 S.C, 2272
[3] AIR 1997 S.C., 1390
[4] AIR 1996 S.C., 11
[5] AIR 1999 S.C., 393
[6] W.P.No.798/2005 of A.P.High Court, dt.10-2-2005
[7] W.P.No.10388/2004 of A.P.High Court, dt.17-1-2005
[8] W.P.No.16051/2004 of A.P.High Court, dt.16-11-2004
[9] W.A.No.278/2004 of A.P.High Court, dt.11-2-2004
[10] W.P.Nos.3663 and 3637 of 2001 of Bombay High Court, dt.28-9-2001
[11] 1999 (4) Bom.C.R., 729